IN THE

United States
Court of Appeals
For the Ninth Circuit

No. 14777

HENRY E. RUBELT, by Raymond Edward Ashby, his grandson and next friend,

Appellant.

vs.

D. O. BYBEE and W. A. BYBEE,

Appellees.

Appeal from the United States District Court for the District of Idaho, Southern Division

APPELLEES' BRIEF

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I

STATEMENT OF JURISDICTION

This action was commenced by appellant, through his grandson and next friend, to set aside a lease and option agreement on grounds of fraud, together with a claim for money damages (pp. 3-11). While a judgment of dismissal was entered on the merits in this case (pp. 36, 37), the district court also con-

cluded (p. 36) that the appellant had failed to sufficiently prove diversity of citizenship (pp. 198-234) requisite to conferring jurisdiction under Title 28, USCA, Section 1332, the question of diversity of citizenship having been put in issue by allegations of the complaint (p. 3) and denials and allegations of the answer (p. 30).

II

STATEMENT OF THE CASE

On or about April 12, 1950, appellant was the owner of approximately 2500 acres of land in Owyhee County, Idaho, (pp. 4, 30), held state land leases (pp. 5, 30) and held certain federal grazing rights for 450 head of cattle and 25 horses (pp. 6, 31).

Appellant was about 81 years of age (pp. 46, 71, 74) and had two children, Mrs. Clara Ocamica and Henry Rubelt, Jr. (pp. 62, 63, 92). Mrs. Ocamica lived away from the ranch for the past 21 years (p. 64), visiting her father at the ranch about once a year since her mother's death in 1939 (pp. 64, 65). Henry Rubelt, Jr., while owning another ranch of his own (pp. 66, 82, 83) lived on appellant's ranch with his family (pp. 65-67, 84) until after the 12th of April, 1950.

All cattle on the ranch were owned and operated by Henry Rubelt, Jr. (pp. 80-82) and had been for many years (p. 81). Appellant was to receive one-half of the beef money in return for Henry, Jr. running the cattle operation (p. 85).

There were several outbuildings on the ranch (p. 51) and a stone house, completed in 1919, but with no modern facilities (p. 67). The ranch is in a remote part of Owyhee County, Idaho, (p. 217), in desert, rimrock and very rough country (p. 183), accessible only by a rough, rocky trail (p. 173). It is about one mile high in elevation (p. 172) with an average snow depth of three feet (p. 116) and in a very windy country (p. 116). The feeding season is short (p. 171).

Prior to the date of the transaction in question, appellant's son, Henry, Jr. had been planning to move to his own place (p. 89) and appellant had been trying to sell this ranch (pp. 89-90). Appellant had offered the ranch to one Earl Riddle, who lived nearby, for $40,000.00 and Riddle didn't want it (pp. 90-91.) Appellant also tried to sell it to a sheep man in Twin Falls, Idaho, for $50,000.00 (p. 91) but this man declined to purchase also.

Appellee D. O. Bybee was interested in purchasing a ranch in the spring of 1950 and while driving around in Owyhee County, Idaho, just looking, was referred to the Rubelt property by some people in that area (pp. 204-205) who knew the place was for sale (p. 205). Appellee had never heard of Rubelt or the Rubelt ranch up to this time (p. 204).

Appellee was referred to Mr. Ocamica, appellant's son-in-law (p. 205) and he made inquiry of Mr. Ocamica as to the nature of the ranch and the price (p. 205). Mr. Ocamica advised that appellant wanted about $40,000.00 for the ranch (p. 206). Appel-

lee D. O. Bybee then went to the ranch and conversed with appellant and went over the ranch with him (pp. 206-207). While appellee did not know the appellant until this meeting, appellant gave evidence of excellent physical health and was mentally alert, though it appeared there was some impairment of his eyesight (pp. 207-208). He was considered to be quite a remarkable man for his age, from both a physical as well as a mental standpoint (pp. 163-165). Subsequent to this time and as late as November 5, 1953, (pp. 70-71) appellant appeared very mentally alert with an excellent memory (pp. 71, 73-80, 112) and still working in the fields and doing chores (pp. 109-110).

A short time after this first meeting with appellant, both appellees D. O. Bybee and W. A. Bybee went to the ranch and again discussed a possible sale with appellant (p. 212). Appellant, knowing the extent and value of his holdings and having an excellent comprehension of the value of the appurtenant grazing rights (p. 80) offered the place to appellees for $40,000.00 and when appellees indicated they could not pay that much, appellant offered to lease it to them for $3,000.00 per year with an option to purchase, applying the rent payments on the purchase price of $40,000.00, appellant to pay the taxes and state land rentals (pp. 120, 121, 212). Appellees accepted this offer and the three parties went in to Mountain Home, Idaho, to the office of one Perce Hall, an attorney (p. 213). Mrs. Henry Rubelt, Jr., was present during the negotia-

tions at the ranch (p. 211).

Appellees had never seen or heard of Mr. Hall before (pp. 213, 228-229) but he had previously done legal work for appellant (pp. 93-95) and appellant considered Mr. Hall his attorney (pp. 99, 101). The parties discussed the proposed transaction with Mr. Hall and met again at Hall's office several days later to execute the document. (pp. 102, 104, 213-214). Hall read the agreement over (pp. 121, 215, 230) and explained it (pp. 215, 230) and the parties executed the same (pp. 11-23).

Appellees shortly thereafter went into possession and in addition to operating the ranch as an integral part of their cattle operations, made some physical improvements thereon (pp. 220-224) valued in excess of $2000.00 (p. 223).

In December 1950 the agreement was amended to extend the option period (pp. 24-28, 117). Several years later appellees requested permission to sub-lease the ranch and appellant refused because his son had permitted a sub-lease on the son's ranch and considerable trouble had developed over it and appellant did not want similar trouble (p. 119).

Appellant claims to have learned he was defrauded about a week after execution of the first agreement (pp. 113, 114) however he accepted the rent payments thereafter (pp. 117-118), entered into the amendment in December 1950, and felt friendly to his attorney Mr. Hall (p. 118).

Appellant's complaint, wherein for the first time he claims fraud on the part of appellees, or com-

plains at all for that matter, was filed May 15, 1953.

Relative to the question of citizenship of appellee D. O. Bybee, the record shows that while he maintained a house in Oregon and his wife and children remained there (p. 202) it was a matter of necessity since there were no schools available near the ranch in Idaho (pp. 224-225) and the ranch was in an extremely remote place out in rough desert country and not conducive to comfortable living for a wife and children. Appellee D. O. Bybee took care of all of the Idaho operations of himself and his brother, involving several ranches (pp. 226-227) and he registered to vote and voted in the 1952 elections at Riddle, Owyhee County, Idaho, (p. 225) and considered Owyhee County, Idaho, his official place of residence (pp. 190, 225).

III

ARGUMENT

Appellant has sought in this action to set aside a lease and option agreement on the grounds of fraud. To support the charge of fraud appellant has made numerous allegations which the facts show to be absolutely false and sham.

Appellant alleged in paragraph VI of the complaint (p. 6) that on April 12, 1950, he was living on the ranch and alone and by himself attempting to operate the same. Appellant's own sworn testimony shows conclusively that he lived on the ranch with his son and daughter-in-law and their children, that the cattle all belong to the son and the son op-

erated the ranch (pp. 66-67, 80-82, 84, 85).

Also in paragraph VI of the complaint, appellant asserts that appellee, D. O. Bybee, fraudulently induced appellant to enter into the agreement in question. This is entirely unsupported by the facts which show conclusively that appellant had been trying to sell the ranch prior to appellees' entrance into the picture (pp. 89-91); that he set the price himself and offered the lease and option provisions (pp. 120, 121, 212) and there is an entire lack of evidence to show that appellees were possessed of any information regarding the ranch which appellant did not have and which appellees should have disclosed or that they dealt other than at arm's length or that they made any false or misleading statements to appellant. A vendor is supposed to know the value and qualities of his own property and there is nothing that requires an arm's length purchaser to disclose other information. Am. Jur. 562, Section 87. While there are exceptions to all rules, there can be no application of any exception to the above rule unless there be some representation by the purchaser upon which an ignorant seller relies to his prejudice. 55 Am. Jur. 563, Section 88. Here we have no evidence of any representations by appellees nor any evidence that they had any superior information which they had a duty to disclose and failed to disclose.

There can be no fraud without misrepresentation. In order that there be an actionable fraud the representation must relate to a matter of fact. 37 CJS

217. One cannot secure redress from fraud where he acted on his own judgment derived from independent knowledge, investigation, reports or advice and not on any representations made to him. Baird vs. Gibbard, 32 Idaho 796, 189 Pac 56; 37 CJS 284, Section 37.

Fraud will not be presumed and the appellant has the burden of establishing all of the elements of fraud by clear and convincing evidence. Nelson vs. Hoff, 70 Idaho 354, 218 Pac 2nd 345; Smith vs. Johnson, 47 Idaho 468, 276 Pac 320.

Appellant uses the term "fraud" or "fraudulently" on numerous occasions throughout the complaint and the above principles as related to the facts apply in each instance.

Appellant also alleges in paragraph VI of the complaint that appellee D. O. Bybee induced appellant to go to the offices of Perce Hall, Bybee's attorney, and there fraudulently induced appellant to execute the agreement. Again the testimony shows clearly that appellant considered Hall to be his attorney (pp. 99, 101); that Hall had previously done legal work for appellant (pp. 93-95) and that appellees had never seen or heard of Hall before (pp. 213, 228, 229) and went to Hall at appellant's suggestion (p. 214). The use of the term "fraudulently" in the several instances above referred to is purely an unfounded conclusion without factual basis or support.

In paragraph VII of the complaint (pp. 6, 7) it is alleged that appellees fraudulently induced appel-

lant to execute the amendment to the agreement in December, 1950. Again this bald conclusion is entirely unsupported in fact.

In paragraph VIII of the complaint (p. 7) it is next alleged that at the time appellant entered into the agreemnt in April 1950, and the amendment thereto in December, 1950, he did not know the value of his property, the value of the appurtenant grazing rights but in fact believed them worth nothing and because of his age and infirmities of mind and body was unable to obtain these values. Nothing specific was alleged as to the infirmities of mind or body.

There is not one iota of evidence to indicate that appellant was ignorant of the value of his property, in fact, his general sworn testimony indicates quite clearly that he was thoroughly familiar with the nature, extent and value of his holdings and had been trying to dispose of them for comparable prices (and unsuccessfully it might be added) before the appearance of appellees. He advised appellee D. O. Bybee what his grazing rights were (pp. 217, 218) and that they were good rights (p. 218). That he knew the value of these grazing rights was made quite clear even several years later when he testified as follows (p. 80):

Q. "You had grazing rights with that ranch, didn't you?"

A. "Sure, it wouldn't be no good without."

Q. "No, that kind of ranch is no good without grazing rights, is it?"

A. "No."

It can hardly be said he believed these grazing rights to be worthless as alleged in the complaint.

In paragraph IX (pp. 7, 8) appellant next alleges that appellees were guilty of fraudulent conduct in several respects. First, that they falsely represented to appellant that the ranch was worth no more than $30,000.00 when in fact it was worth considerably more. A discussion of value will be set forth hereinafter. For the present let us look only to the question of fraud and misrepresentation. There is no evidence in this record that appellees falsely represented anything to appellant. The general rules of law pertaining to fraud hereinbefore cited are applicable. In addition, the record affirmatively shows that appellee D. O. Bybee did not feel that the ranch was worth $40,000.00, at least to him (p. 212) and that it was worth actually $25,000.00 to $30,000.00 (pp. 231, 232). This was and is appellee's own opinion. An expression of opinion honestly made cannot constitute fraud. 37 CJS 226, Section 10. The record fails to disclose that appellee D. O. Bybee acted in any manner indicating a lack of honesty. He was entirely unacquainted with the ranch (pp. 204, 205) except for several inquiries made after learning it was for sale (pp. 205, 206, 208-211) and the price paid was actually in line with that previously asked by appellant (p. 212) which price was also known to appellant's son-in-law (pp. 205, 206). In addition, having operated the ranch for several years up to the time of

the taking of his deposition, appellee D. O. Bybee still was of the same opinion on value (pp. 216, 217). The allegation of fraud as asserted in this paragraph of the complaint, in light of the evidence, is pure sham.

Secondly, it is alleged in paragraph IX of the complaint that appellee D. O. Bybee knew of the aged and infirm condition of appellant, knew that appellant was ignorant of the value of his property and that said Bybee concealed the true values from appellant. It was quite obvious, of course, that appellant was an elderly man. The record fails to show, however, that he was physically infirm or that said D. O. Bybee knew of any infirmities. The evidence discloses that appellant took said D. O. Bybee on a walking tour of the ranch and certainly outdid the younger man physically (p. 207). In addition, several years later appellant was still working in the field to some extent and doing chores (pp. 109-110). He was a remarkable man both physically and mentally (pp. 150, 151, 163). Age in itself indicates nothing. The wisdom of most people increase proportionately with age up to the point that they become senile and this record discloses no such condition in the appellant. Physical or mental infirmities or knowledge of them in appellee D. O. Bybee was certainly not proven, in fact the opposite appears to be the case.

The question of appellant's knowledge of the value of his property and grazing rights has heretofore been discussed. In addition, his son, daugh-

ter-in-law, daughter and son-in-law all knew he was trying to sell the ranch, knew of his proposed price and his daughter-in-law was present during the discussions with appellees. If he was literally giving the ranch away why was there no opposition or protest from the family?

Nor is there any evidence whatsoever to indicate that appellee D. O. Bybee knew the ranch was of a vastly greater value than appellant was trying to sell it for. In fact, the evidence in that regard shows that the said D. O. Bybee at that time thought it to be of less value, at least on a cash sale basis (p. 232) and he paid the price of $40,000.00 only because of the lease and option provisions (p. 216).

Thirdly, appellant alleges in paragraph IX of the complaint that at the time of the execution of the agreement and the amendment thereto, appellant was alone and without the advice of counsel and was in effect fraudulently induced to execute the agreements. This has been discussed hereinabove and will not be repeated except to add that such an allegation in light of the evidence is patently false.

Paragraph X of the complaint (p. 8, 9) contains allegations similar in import to those contained in paragraphs VI, VII, VIII and IX with additional allegations that the yearly rentals should have been $10,000.00 per year and the purchase price of the property for cash $75,000.00 or on a lease and option basis, $175,000.00. All other allegations contained therein are merely simple arithmetic and mean nothing.

Appellant called several witnesses to testify to value. Albert Harley, a county commissioner was permitted to testify because of his technical status as a commissioner, however, the court recognized the weakness of his testimony and permitted it only because the case was being tried to the court and not before a jury (pp. 142, 143). Another witness, Davidson, testified that cow unit values were selling for from $80.00 to $175.00 (p. 168) but that he had never been on the Rubelt ranch (p. 168). Another witness, Newell, testified to a unit value of $150.00 (p. 180) but admitted he did not even know where the Rubelt ranch was except by hearsay (p. 180) and had not been on the place (p. 180) nor did he know where the range for the ranch was (p. 181). He did not know the length of the feeding season, the elevation, snow depth, the distance of the Rubelt ranch to Mountain Home, Idaho, the nearest railroad, or the distance to Riddle, Idaho, the nearest settlement of any kind. (pp. 182, 183)

Appellant's testimony on values was very weak and hardly sufficient to overcome the testimony of appellee D. O. Bybee as to his opinion, the testimony of Bybee and appellant himself as to appellant's apparent opinion based upon his sales price, or the fact that none of the members of appellant's family made any protest or objection to either this sale or prior attempted sales for comparable prices. In addition, if the property was worth anywhere near what appellant alleges it to be in his complaint, either Earl Riddle or the Twin Falls sheep man to

whom appellant had offered the property previously, or others in the area, would have jumped at the chance to make such a remarkable purchase. The testimony is insufficient to show that the actual purchase price in the instant case, considering application of lease payments to purchase price and payment of taxes and state land rentals by appellant, was so grossly inadequate as to shock the conscious.

Even if it were to be assumed for the sake of pure argument that the price was inadequate, yet nevertheless inadequacy of price agreed to be paid for land is not ordinarily of itself sufficient to prove fraud on the part of the purchaser and entitled the vendor to have the sale set aside for such fraud where there is no confidential relationship between the parties and nothing to indicate mental incapacity or weakness on the part of the vendor. 55 Am. Jur. 566, Section 91.

Gross inadequacy of price, in order to constitute fraud, must generally be connected with other circumstances, though slight in their nature, to afford relief by way of rescision. 55 Am. Jur. 567.

Among the circumstances, which, when combined with gross inadequacy of consideration, form a ground for rescinding a contract are fraud or deceit (not shown in this case) or the violation of a confidential relationship (not shown in this case). In absence of fraud or imbecility, mere old age, consequent loss of memory and feeble health are not sufficient ground for rescision although a sale is made for much less than the value of land. 66 CJ

748, Section 319.

In the instant case as heretofore discussed, there is no proof whatsoever of fraud on the part of appellees or either of them. Appellant's proof shows only that appellant was elderly, somewhat hard of hearing with naturally failing eyesight and occasional memory lapses. The evidence discloses affirmatively that appellant was a remarkable man for his age, both mentally and physically, and fully possessed of all of his mental faculties. Far from being imbecilic, he was mentally alert, and far from being in feeble health was very active physically for a man his age. Again, assuming an inadequacy of price, where are the additional factors which are necessary to permit a rescision? Appellant's own family must have considered him fully capable of handling his affairs for they voiced no protest or objections to either this sale or previous attempts on the part of the appellant to sell his property.

Appellant has not made a case either on inadequacy of price or the necessary accompanying factors.

In paragraph XI of the complaint (p. 10) appellant alleges that the agreements were not read to appellant prior to execution. Again this is patently false (pp. 121, 215, 230). In addition it is alleged that appellant did not discover the unfairness of the transaction until he consulted his attorneys in 1953. This again is not in conformance with the facts. Appellant himself stated that he discovered the fraud about a week after the execution of the agree-

ment (pp. 113, 114). Yet thereafter, he accepted rental payments (pp. 117, 118), entered into the amendment in December 1950 and did not voice any protest until the complaint was filed herein on May 15, 1953, more than three years after appellant claims to have discovered the alleged fraud and deception.

The applicable statutory provisions of the State of Idaho relative to limitation of actions are as follows: (Idaho Code, 5-218)

> "Statutory liabilities, trespass, trover, replevin, and fraud.--
>
> Within three years:
>
> 1. * * *
>
> 2. * * *
>
> 3. * * *
>
> 4. An action for relief on ground of fraud or mistake. The cause of action in such cases is not to be deemed to have accrued until discovery, by the aggrieved party, of the facts constituting the fraud or mistake."

Relative to the discovery of the fraud, the Idaho courts have held that knowledge of such facts as would put a reasonably prudent person upon inquiry is equivalent to knowledge of fraud and will start commencement of the statute. Parish vs. Page, 50 Idaho 87, 293 Pac 979; Williams vs. Shrope, 30 Idaho 746, 168 Pac 162.

In addition to his cause of action, if any really exists, being barred by the Idaho statute of limitations, appellant is estopped by laches from now as-

serting such claim. Where a vendor has knowledge of facts entitling him to rescind for fraud, he must act within a reasonable time. Tidgwell vs. Bouma, 157 NW 200; Schenck vs. State Line Tel. Co., 144 NE 592. Rescision of a contract cannot be ordered unless plaintiff has been diligent. Leppert vs Ratterree, 276 Pac 1037. A vendor must act promptly after discovery of a fraud in order to rescind a contract for the sale of real property, and if after discovery of the fraud, he accepts any benefits from the contract, as by accepting payments, or does any other act which implies his intention to abide by the contract, he loses his right to rescind. 55 Am. Jur. 1016, Section 624.

In the instant case, appellant accepted rental payments for several years following execution of the agreement in question and entered into an amendment thereof in December, 1950, some eight months following the execution of the agreement and discovery of the purported fraud and deception. In addition, appellees have changed their position in that their cattle operations have been adjusted to make this ranch an integral part of their operations and they have put considerable improvements into the ranch.

Appellant's claim is barred both by the Idaho statute of limitations applicable thereto and by laches.

In his first Specification Error set forth on page 5 of his brief, appellant asserts the lower court erred in making Finding of Fact I (p. 34). The court

found the evidence insufficient to show the residence of D. O. Bybee to be outside of the State of Idaho. Granted that said D. O. Bybee maintained his wife and children in Oregon, nevertheless the testimony shows that the country where he lived in Idaho was hardly a fit place for his wife and children and there were no schools available for the youngest child (pp. 224, 255). The domicile of the wife is not necessarily that of the husband. Taylor vs Milam, D. C. Ark., 1950, 89 Fed. Sup. 880. D. O. Bybee considered Idaho his domicile after purchase of the properties here (pp. 190, 255) and was charged with the Idaho operations of he and his brothers (pp. 226, 227). He registered to vote and voted in the 1952 elections in Owyhee County, Idaho (p. 225). The fact that he registered his car in Oregon or had an Oregon drivers license or kept most of his clothes at the home of his wife and children or referred to that place as home is not of sufficient basis, in view of the contrary evidence, to state that the court erred in its finding on this point. The court's finding is not clearly erroneous and on review the evidence will be considered most favorably to appellee. U. S. vs Comstock Ext. Mining Co., CCA 9th, 214 Fed. 2nd 400; Judd vs Wasie, CCA 8th, 211 Fed. 2nd 826; Paramount Pest Control Service vs Brewer, CCA 9th, 177 Fed. 2nd 564.

The second specification of error set forth by appellant on page 5 of his brief is that the lower court erred in making Finding of Fact No. IV (p. 35) in that the evidence showed the appellant to be infirm

in mind and body and wholly incompetent to transact and carry on his business. The lower court's finding fact in this regard is completely and unequivocally supported by the evidence and the assertions of appellant relative to the infirmity of mind and body, and incompetence to transact and carry on business, are completely without factual support or basis.

In the third specification of error set forth by appellant in his brief on page 5 thereof, it is asserted the lower court erred in making Finding of Fact V (p. 35) in that the agreement is so patently unfair, deceptive and inequitable, that taken with the infirmities of the plaintiff, they amount to constructive fraud. The lower court in this finding states that there is no evidence to indicate whatsover that there was any fraud on the part of the defendants or either of them in the negotiations for or the execution of either the original agreement or the amendment thereto. Appellant does not indicate that the lower court erred in finding no actual fraud but now claims that the error occurred because the agreements are patently unfair, deceptive and inequitable and amount to a constructive fraud. It is submitted that the agreements are not patently unfair, deceptive and inequitable but are subject to examination by the court in light of all of the evidence produced. In equity, rescision of land contracts is not a matter of right but rests in the sound discretion of the courts. Kavanau vs Fry, 262 NW 763. Neither inadequacy of price, improvidence, surprise

or mere hardship require judicial rescision of a contract. Nunge vs Crawford, 88 Pa. Super. 516. When a motion to dismiss is made for insufficiency of the evidence, in a case tried without a jury, it is the duty of the court to weigh to evidence. Fed. Rules Civ. Proc., Rule 41 (b); Chicago and NW Ry Co., vs Froehling Supply Co., CA 7th, 179 Fed 2nd 133; Allred vs Sasser, CA 7th, 170 Fed 2nd 233.

In addition, it is impossible to construe the agreements in the light of the infirmity of the appellant as set forth in the specifications of error because no infirmities of appellant other than defective hearing, failing eyesight and occasional memory lapses have been shown.

The fourth Specification of Error means nothing since the court could not have decreed a cancellation of the agreements on any grounds at that stage of the lawsuit. Defendant is expressly permitted by the rule (Fed. Rules Civ. Proc., Rule 41) to put on his proof in event of an adverse ruling on his motion to dismiss and he is not deemed to waive the right to offer evidence by making the motion.

CONCLUSION

While the strongest point appellant makes in this appeal is his claim that the court erred in finding appellant had not produced sufficient evidence to prove the residence of appellee D. O. Bybee to be without the State of Idaho, yet nevertheless the court's finding in that respect is supported by evidence and is not clearly erroneous. In addition, the question of jurisdiction in this case is absolutely im-

material to the final determination thereof on the merits and the record completely fails to show in any respect whatsoever that the lower court erred in its Findings of Fact IV and V as set forth in appellant's Specifications of Error, 2 and 3.

The doctrine that a "scintilla" of evidence is sufficient against a motion to dismiss is not followed in the federal courts. The rule is that there must be substantial evidence before the defendant is required to undertake a defense. Carew vs RKO Radio Pictures, DC Cal., 43 Fed. Sup. 199. On appeal, the lower court's findings of fact are presumptively correct and will not be set aside unless *clearly* erroneous. Olson vs Standard Acc. Ins. Co., CA 8th, 211 Fed. 2nd 661; Judd vs Wasie, CA 8th, 211 Fed. 2nd 826; Linscomb vs Goodyear Tire and Rubber Co., CA 8th, 199 Fed. 2nd 431; Paramount Pest Control Service vs Brewer, CA 9th, 177 Fed. 2nd 564; Fed. Rules Civ. Proc., Rule 52.

This court does not retry the case (Hudspeth vs Esso Standard Oil Co., CA 8th, 170 Fed. 2nd 418) or substitute with respect to issues of fact, its judgment for that of the trial court; there must be a clear showing that the findings of the trial court are erroneous. St. Louis Union Trust Co. vs Finnegan, CA 8th, 197 Fed. 2nd 565; The Sirius Star Inc. vs Sturgeon Bay Shipbuilding and Dry Dock Co., CA 7th, 196 Fed. 2nd 479; Noland vs Buffalo Ins. Co., CA 8th, 181 Fed. 2nd 735. In light of the evidence shown by the record in this case it cannot be said that the findings of the lower court are

clearly erroneous and not supported by evidence. In fact, the evidence supporting the findings of the lower court is overwhelming as compared to any evidence supporting the contentions of the appellant, at least so far as Findings of Fact IV and V are concerned.

In addition, the reviewing court should take that view of the evidence which is most favorable to the appellee. U. S. vs Comstock Ext. Mining Co., CA 9th, 214 Fed. 2nd 400; Judd vs Wasie, supra; Linscomb vs Goodyear Tire and Rubber Co., supra; Paramount Pest Control Service vs Brewer, supra.

The record also discloses quite clearly that appellant's action is barred both by the Idaho statute of limitations (Idaho Code, 5-218) and by laches.

Appellees' motion to dismiss was meritorious, the lower court's judgment of dismissal was properly entered and it is respectfully submitted that the same should be sustained.

Respectfully submitted,

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